

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FILED
IN CLERKS OFFICE

2004 SEP 23 P 2: 36

Cr. 04-01671-NG
U.S. DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES OF AMERICA
vs.
EDWIN RODRIGUEZ ET. AL.

MEMORANDUM IN SUPPORT OF MOTION
TO STRIKE

A. The superseding indictment is identical to the original indictment in all respects except for the addition of the NOTICE OF ADDITIONAL FACTS on page 4. Fed. R. Crim. R. Rule 7(c) (1) provides that an indictment “shall be a plain, concise and definite written statement of the essential facts constituting the offense charged”. It is submitted that the added Notice does not comply with the requirements of the rule in that it does not charge an “offense”.

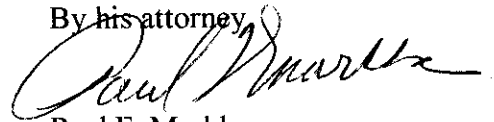
It has been the usual practice of the government, as in the original indictment and, also, in the body of Counts One and Two on pages 2 and 3 of the superseding indictment, to advise the defendant by a notice that the amount of the drugs alleged in the said Count exposed the him or her to certain mandatory sentences under 21 USC 841. The notice on page 4 of the superseding indictment does not refer to or incorporate a federal statutory crime; it merely refers to a section the United States Sentencing Guidelines (USSG).

B. The government’s sole purpose in adding the Notice Of Additional Facts in the superseding indictment is an attempt to bring this case the USSG. This Court, in *United States v. Mueffleman*, 2004 U.S. Dist. LEXIS 14114 (July 26, 2004), held that, under *Blakely v. Washington*, 159 L. Ed. 2d 403, 124 S.Ct. 2531 (June 24, 2004), the USSG were unconstitutional and its provisions were not severable. Therefore, the recitation of the constitutionally infirm USSG § 4B1.1 and 4B1.2 in the superseding indictment is of no effect and must be stricken as surplusage.

Respectfully submitted

Edwin Rodriguez

By his attorney



Paul F. Markham

PO Box 1101

Melrose, MA 02176

781-665-1800

B.B.O. 3208

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of
the above document was served upon the
attorney of record for each party by ~~mail~~ by hand.

Date:

9/23/04 